

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In Re:

Chapter 7

Lynn M. Tracey,

Case No.: 03-51032 GFK

Debtor.

Terri A. Georgen, Trustee,

Plaintiff,

v.

Adversary No. 04-5021

Lynn M. Tracey, Donovan Schwarzkopf
and Dawn Schwarzkopf,

Defendants.

PLAINTIFF'S TRIAL BRIEF

Counsel for Plaintiff:

BEST & FLANAGAN LLP
Patrick B. Hennessy
Attorney Registration No. 124412
225 South Sixth Street, Suite 4000
Minneapolis, MN 55402
Phone: (612) 339-7121
Email: phennessy@bestlaw.com

Counsel for Defendants:

Arthur M. Albertson
Attorney Registration No. 863
101 West Second Street, Suite 107
Duluth, MN 55802
Phone: (218) 733-0660

TABLE OF CONTENTS

TABLE OF AUTHORITIES	2
I. INTRODUCTION	3
II. FACTS	3
III. ARGUMENT	5

TABLE OF AUTHORITIES

Cases

<u>Whaley v. Mountainwest Financial Corp.</u> , 229 B.R. 767, 773 (Bankr.D.Minn. 1999)	5,6
<u>Lovett v. Shuster</u> , 633 F.2d 98 (8 th Cir. 1980)	6
<u>Leonard v. Mylex Corp.</u> , 240 B.R. 328, 366 (Bankr.D.Minn. 1999)	7
<u>Collier on Bankruptcy</u> ¶ 548.05 [1] at 548-116 (15 th ed. rev. 2004)	8
<u>Gillman v. Preston Family Investment Co.</u> , 23 B.R. 434, 444 (Bankr.D.Utah 1982)	8,9
<u>Krommenhoek v. Natural Resources Recovery, Inc.</u> , 166 B.R. 701, 704 (Bankr.D.Idaho 1994)	9

Statutes

11 U.S.C. §548	5, 6, 8
Minnesota Statute Section 508.25	6
11 U.S.C. §101(32)	7
11 U.S.C. § 550	9

I. INTRODUCTION

Defendants have acknowledged in their Answer this Court's jurisdiction over defendants and the subject matter of this adversary proceeding and that this adversary is a core proceeding. Trustee seeks to recover, as a fraudulent conveyance, a transfer by the Debtor by deed recorded on March 20, 2003, of a lot in St. Louis County, Minnesota, which lot was transferred less than five months prior to the filing of the bankruptcy, to the Debtor's son. Trustee asserts this property was worth approximately \$25,000.00 to \$35,000.00 at the time of such transfer. The Defendants have provided inconsistent information regarding the consideration, if any, paid by Debtor's son. However, the evidence will establish such consideration was somewhere between \$0.00 and, at most, \$3,900.00. This was not a reasonably equivalent value for the transfer of this property. The evidence will show that at all times material hereto, the Debtor was insolvent.

II. FACTS

The Petition commencing this case was filed on August 7, 2003. It is undisputed that until March 20, 2003, Debtor Lynn M. Tracey was the record owner of real estate in St. Louis County, Minnesota, legally described as:

“The Northerly One Hundred Sixty-five Feet (N'ly 165') of the East One-Half of Northeast Quarter (E ½ of NE ¼) of Northeast Quarter of Southeast Quarter (NE ¼ of SE ¼) of SECTION Twenty-one (21), TOWNSHIP Fifty (50) North of RANGE Fifteen (15) West of the 4th Principal Meridian, according to the United States Government Survey thereof. EXCEPT ALL MINERALS.”

(See Complaint ¶ 8; Answer ¶ 8) (the “Property”).

Debtor acquired the Property by Contract for Deed from her brother and his wife, Michael M. and Rae Ann M. Tracey, on April 11, 1991. The Contract for Deed called for

a \$2,000.00 cash down-payment and an additional \$4,000.00 by monthly payments until the balance was paid. The Contract for Deed was recorded in the Office of the Registrar of Titles in St. Louis County on July 22, 1991 as document number 536977. Subsequently, Michael M. Tracey and Rae Ann M. Tracey transferred the Property to Debtor by Warranty Deed dated September 26, 2001 and recorded in the Office of the Registrar of Titles in St. Louis County, Minnesota on October 12, 2001 as document number 709689.

Record ownership of the Property passed from Debtor to Donovan M. Schwarzkopf, who is the Debtor's son, by way of a Deed dated February 24, 2003 and recorded in the Office of the Registrar of Titles in St. Louis County, Minnesota on March 20, 2003 as document number 745582. According to the bankruptcy schedules filed by Debtor in this case, and in her Chapter 13 case filed July 1, 2002, the Debtor was insolvent at that time and has been insolvent at all times since July 2002.

Based on the deed tax as set forth in such deed, the stated consideration in this transaction was less than \$500.00. The Trustee has had the Property valued by David Jensen, a realtor with over 26 years experience in the area where the Property is located. Mr. Jensen has valued the Property with a value of between \$25,000.00 and \$35,000.00 as of March 20, 2003.

Debtor asserted in her bankruptcy schedules in this case that she transferred the Property to her son for less than \$1,000.00. In deposition testimony by Debtor and her son, Donovan Schwarzkopf, they now assert Donovan Schwarzkopf paid approximately \$3,900.00 for the Property, by payments to Michael M. Tracey in the late 1990s. They did not assert that Donovan Schwarzkopf made any payments to Debtor for her interest in the

Property. The Defendant's facts regarding the consideration paid for the Property and the circumstances of its transfer are constantly changing.

The Debtor previously filed a Chapter 13 bankruptcy petition on July 1, 2002. According to Schedule A of the Debtor's July 2002 bankruptcy petition, the Debtor was, at that time, the sole owner of the Property, which she listed as having a fair market value of \$10,700.00.

According to Section 10 of the Debtor's Statement of Financial Affairs filed with the schedules in this case, Debtor transferred the Property to her son, Defendant Donovan Schwarzkopf, in November of 2002 for less than \$1,000.00.

According to her deposition testimony in this Adversary Proceeding, Debtor signed a deed transferring the Property to her son, Donovan Schwarzkopf, in 1996. No such deed was ever recorded.

III. ARGUMENT

A. The Trustee May Avoid the Transfer of the Property to Donovan Schwarzkopf Pursuant to 11 U.S.C. §548

11 U.S.C. §548(a)(1)(B) provides that a trustee can avoid any transfer of an interest of the debtor in property made within one year before filing of the petition if the debtor:

- “(i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and
- (ii) (I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;
(II) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital; or
(III) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured.”

The statutory language can be broken down into three basic elements: (1) a transfer of property of the debtor; (2) while the debtor was insolvent; and (3) the receipt by the debtor of less than reasonably equivalent value for the asset transferred. Whaley v. Mountainwest Financial Corp., 229 B.R. 767, 773 (Bankr.D.Minn. 1999). The Trustee has satisfied her burden of proof with respect to each of these elements. The transfer of the Property from Debtor to Defendant Donovan Schwarzkopf may be avoided under §548(a)(1)(B).

1. The Transfer

The threshold requirement for avoidance under this section is that the transfer must have occurred within one year before the filing of the petition. For purposes of 11 U.S.C. §548, a transfer is deemed made when it is so perfected that a bona fide purchaser from the debtor cannot acquire an interest in the property that is superior to the interest of the transferee. 11 U.S.C. §548(d)(1). State law establishes when an interest in property has been so far perfected that a bona fide purchaser cannot acquire a superior interest. Lovett v. Shuster, 633 F.2d 98 (8th Cir. 1980).

Minnesota law provides for two recording schemes commonly referred to as abstract and torrens. The Property at issue here is torrens property, and the applicable statute is Minnesota Statute Section 508.25, which provides as follows:

Every person receiving a Certificate of Title pursuant to a Decree of Registration and every subsequent purchaser of registered land who receives a Certificate of Title in good faith and for a valuable consideration, shall hold it free from all encumbrances and adverse claims, excepting only the estates, mortgages, liens, charges, and interests as may be noted in the last Certificate of Title in the office of the Registrar and also excepting ... [a listing of seven specific exceptions, none of which are applicable in this case].

Accordingly, under Minnesota Law, Defendant Donovan Schwarzkopf did not acquire an interest in the Property superior to a bona fide purchaser until the Deed conveying the Property to him from Debtor was recorded on March 20, 2003 and a new Certificate of Title was issued to him. This transfer was less than 5 months prior to the filing of the petition commencing this case.

Having established that the Property was transferred less than one year prior to the filing of the petition commencing this case, we turn to the question of the solvency of the Debtor at the time of the transfer.

2. Debtor's Insolvency at the Time of Transfer

11 U.S.C. §101(32) imposes a balance sheet test for insolvency. Leonard v. Mylex Corp., 240 B.R. 328, 366 (Bankr.D.Minn. 1999). Debtor previously filed a Chapter 13 bankruptcy on July 1, 2002. It is clear from the schedules filed in that bankruptcy case, and the schedules filed in the current case, that the debtor was insolvent at all times from July of 2002 to August of 2003. She was insolvent on March 20, 2003 when she transferred the Property to her son, Defendant Donovan Schwarzkopf.

3. Lack of Reasonably Equivalent Value

The issue of reasonable equivalence of value is a question of fact. Leonard, 240 B.R. at 366. This Court has characterized this inquiry as being one of “common sense, measured against marketplace reality.” Id. In the instant case, no more than common sense is needed. Defendant Donovan Schwarzkopf has admitted that he did not pay make any payments to Debtor in connection with the transfer of the Property. The Trustee will introduce evidence that the value of the Property at the time of the transfer, March 20, 2003, was between \$25,000.00 and \$35,000.00. The Debtor's conveyance of a property

valued at somewhere between \$25,000.00 and \$35,000.00 to her son for no consideration is a conveyance for “less than a reasonably equivalent value”.

The Defendants have raised a number of factual arguments, some contradictory, in an attempt to dispute that this transfer was for less than reasonably equivalent value.

The Debtor asserts that she transferred her interest in the property to Donovan Schwarzkopf in 1996. However, no such transfer was ever recorded, and thus under § 548(d)(1) no transfer took place at that time. This assertion by Debtor is also inconsistent with Debtor’s sworn statements in her Chapter 13 bankruptcy schedules, filed in 2002, where she claimed to own the Property, and her schedules filed in this case, filed in 2003, when she claimed to have transferred the Property within the last year.

The Deed by which Debtor did transfer the Property to her son, recorded in March of 2003, recites a consideration, based on the deed tax, of less than \$500.00. The Defendants have provided no documentation of payments made at the time of such transfer to the Debtor. In fact, the Defendants can produce no evidence of payments made by Donovan Schwarzkopf to the Debtor at any time with respect to the Property. Defendants argue that payments made in the late 1990s by Donovan Schwarzkopf to Michael Tracey were on behalf of the Debtor, such payments totalling less than \$4,000.00. Even if these facts were accepted as true, \$4,000.00 is not reasonably equivalent value for a lot worth between \$25,000.00 and \$35,000.00.

The “transfer” for purposes of § 548 took place on March 20, 2003 when the Deed transferring the Property from the Debtor to her son, Defendant Donovan Schwarzkopf, was recorded. Fair value for purposes of 11 U.S.C. §548 is measured at that time. Collier on Bankruptcy ¶ 548.05 [1] at 548-116 (15th ed. rev. 2004); see e.g., Gillman v. Preston

Family Investment Co., 23 B.R. 434, 444 (Bankr.D.Utah 1982) and Krommenhoek v.

Natural Resources Recovery, Inc., 166 B.R. 701, 704 (Bankr.D.Idaho 1994).

B. The Trustee May Recover the Property from Donovan Schwarzkopf Pursuant to 11 U.S.C. §550

11 U.S.C. § 550 provides as follows:

“(a) . . . to the extent that a transfer is avoided under §§ 544, 545, 547, 548 . . . of this title, trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property from –
(1) the initial transferee of such transfer . . .

Trustee requests that the Court order that title to the Property be transferred to the Trustee as a recovery of the Property transferred.

Respectfully submitted,

BEST & FLANAGAN LLP

By /e/ Patrick B. Hennessy
Patrick B. Hennessy
Attorney Registration No. 124412
225 South Sixth Street, Suite 4000
Minneapolis, MN 55402
(612) 339-7121

Attorneys for Terri A. Georgen,
Trustee, Plaintiff

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In Re:

Chapter 7

Lynn M. Tracey,

Case No.: 03-51032 GFK

Debtor.

Terri A. Georgen, Trustee,

Plaintiff,

v.

Adversary No. 04-5021

Lynn M. Tracey, Donovan Schwarzkopf
and Dawn Schwarzkopf,

Defendants.

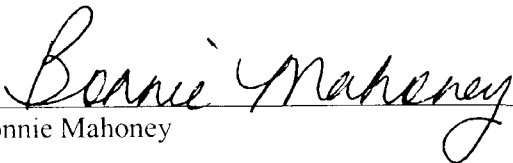
AFFIDAVIT OF SERVICE

STATE OF MINNESOTA
COUNTY OF HENNEPIN

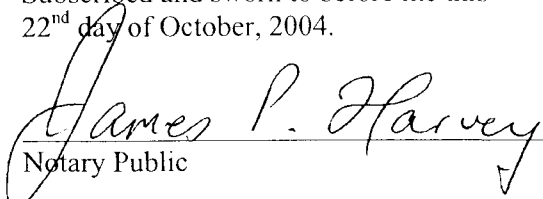
} ss

I, Bonnie Mahoney, declare under penalty of perjury that on October 22, 2004, I mailed by first class mail, postage prepaid, a copy of the attached Plaintiff's Trial Brief and Plaintiff's Objections as to Defendant's Exhibits to the following:

Arthur M. Albertson
Attorney at Law
101 West Second Street, Suite 107
Duluth, MN 55802


Bonnie Mahoney

Subscribed and sworn to before me this
22nd day of October, 2004.


Notary Public

016884/240001/328734_1

